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THE SCOTCH LAW AND LAW BOOKS.

It is well known, that while, in former times, the civil law was striving in vain for ascendancy in England, it gained a very considerable influence in Scotland. At present, it may be said to form the basis of the Scotch law, in matters of civil jurisprudence. The criminal law of Scotland is almost purely Scotch; the continental jurisprudence has had very little to do with it; and it is by no means identical with the English common law of crimes.

But in the administration of both departments, the Scotch courts show some deference to the English decisions, when the question is one upon which domestic authority is indistinct; and the writers of the more recent Scotch law treatises make copious reference to the English cases.

The courts of last resort in Scotland are principally the Court of Session, for civil causes; and the Justiciary Court, for criminal. From the Court of Session an appeal lies to the House of Lords of the United Kingdom; but there is no appeal from the Justiciary Court. The House of Lords, however, in deciding Scotch appeals, proceeds according to the Scotch, and not the English, law.

Although the Justiciary Court and the Court of Session are separate tribunals, independent of each other, they are presided over by the same judges.

The principal modern Scotch reports, to which conveniently we can have access in this country, are the following:

The Court of Session cases are in two series of reports: the first, beginning in 1821, and ending in 1838, contains sixteen volumes. There are several reporters of this series; but it is often, though not uniformly, cited, in the Scotch books, under the name of Shaw, who, in conjunction with Mr. Ballantine, commenced the work. A new series of these reports follows, distinguished only by its beginning anew the numbering of the volumes, and it is continued down to the present time. There are now of this series about seventeen volumes. A few of the last volumes contain, also, in pages separately numbered, cases decided in the House of Lords. This series is often referred to in the Scotch books under the name of Dunlop, the first on the title page of its earlier reporters; but the style of citation is not uniform. All these Court of Session cases, of both series, are printed on a large page, in small type set without leads, and contain generally over a thousand pages each; averaging, it is seen, full three times as much printed matter per volume as our American reports. The other Scotch reports, about to be mentioned, are in volumes not materially larger than our American reports.

The Justiciary Reports are, one volume by Syme, containing cases from 1826 to 1829; two by Swinton, 1835 to 1841; two by Broun, 1842 to 1845; one by Arkley, 1846 to 1848; one by Shaw, 1848 to 1852; and one by Irvine, perhaps not yet completed, extending down to about the present time.

Many cases decided in the House of Lords, on appeal from Scotland, are to be found in the English books. But the Scotch House of Lords cases proper are, a series of five volumes by Craigie, Stewart, and Paton (the volumes subsequent to the first being by Paton alone), covering a period from 1726 to 1812. These are *new reports of old cases*. Then there are two volumes by Shaw, 1821 to 1824; seven by Wilson and Shaw, 1825 to 1834; three by

Shaw and Maclean, 1835 to 1838; one by Maclean and Robinson, 1839; two by Robinson, 1840 and 1841; and seven by Bell, 1842 to 1850. It has already been stated that the later House of Lords cases are reported in the same volumes with those of the Court of Session.

The before mentioned reports, and some other of less value or such as we cannot so easily obtain in this country, are, down to 1852, very well digested in three volumes, (two and a supplemental third) by Shaw.

Of the Scotch law treatises, less need be said. Bell's Commentaries and Erskine's and Stair's Institutes, works of many years standing, and kept somewhat fresh by new editions, are well known to the profession in this country. Of the like substantial character and high authority is the work of Hume on Criminal Law. The number of more recent treatises, of particular interest to us, is not large. In an age when genius is not content to toil for glory alone, there is little chance for a Scotch lawyer, of the highest intellect and culture, to get the return he wants for so much labor bestowed on a law treatise as is necessary to produce a really good one; for the sale of law books is much less in Scotland than in England, and much less in England than in the United States. There is a work by Fraser, on the Domestic Relations, 2 vols., A. D. 1846, written with great research, and possessing otherwise a good deal of merit—quite valuable for American use. There are two volumes, 1830, 1832, by Alison, on the Criminal Law, which, though not equal to Hume in point of research or authority, are readable, and regarded with considerable favor by the Scotch courts. And any one looking over a Scotch law catalogue, will find several other modern treatises in which he will feel an interest.

The principal law publishers of Scotland are the firm of T. & T. Clark, Edinburgh—obliging men, who appear inclined to do fairly by American customers. The "Social Law Library" of Boston bought of them, a year or two ago, a full set of the modern Scotch Reports, and various other books.

We have next to consider whether the Scotch law is of any use to us, when we get it. There are legal authors, lawyers at the bar,

and judges, who in their performances deem it wise to refer occasionally to the civil law. But there can be little doubt that the civil law, as found in Scotland, is ordinarily better for the purposes of such reference, than as found on the continent of Europe. First, because it has had its later growth among a people not only as intelligent as any, but with general habits, with religion and with municipal and civil institutions, most nearly resembling ours. Secondly, because in Scotland, more than on the continent, it has come in contact with the common law, and so imbibed a greater congeniality for it. Thirdly, because we can receive it from Scotland in the form in which we are in the habit of taking our common law; namely, in judicial decisions, pronounced from the bench in the English language, and reported in the same manner as the English and American. We can turn to the Scotch digests and reports, and look up a question of Scotch law precisely as we look up one of English law. And always, when we would draw a principle from a foreign system of laws with which we are not familiar in all its parts, we need to see, to prevent misunderstanding, the full statement and elaborate reasoning which a judge gives in delivering his decision, rather than simply the brief enunciation as usually found in a treatise. It may be objected to such views of the Scotch law, that the English courts seldom refer to it, though Scotland lies by England's side, not deeming it worthy of their regard. The answer, however, is, that the English judges almost never profess, whatever they may do in fact, to look for light beyond their own decisions; and that the people of England feel themselves as much better than the Scotch, as a Scotchman feels himself better than either an Englishman or an American, or as an American knows himself, in his own mind, to be better than both of the others together. Man is a clanish animal; and we find few persons, either at home or abroad, of so wide and exalted understanding, as not to estimate "ours" infinitely above "yours." And this clanish feeling encrusts itself the more deeply as a country increases in years and in folly.

But a young lawyer reading this article is perhaps asking the question—"Suppose, the next case I have in bank, I turn to the Scotch digest, find a reference to a decision in point, take the

report down, look it over, carry it into court, and read it in my argument to the judges; what will be the consequence, what will they say?" The answer is, in the first place, it will depend much upon who the judges are, and upon how you break the matter to them. In the next place, if the question is already well settled by the common law tribunals, they will think, if they do not say, that when you become older and wiser, you will not inflict upon them a surplusage of Scotch law in such a case. But if the question is in the common law a new one, settled neither by direct adjudication nor the necessary force of any established principle; and if the Scotch decision is put by the Scotch judges on reason and justice, and not on any mere technical rule of local law; your judges will be likely to follow it, unless they see clearly that the Scotch court was wrong.

Notwithstanding the wide culture which the common law has received, there are many questions in it which yet remain to be settled; and these, principally, are the questions which wise lawyers, practising before wise judges, agitate. Such a question may have been settled in a foreign tribunal. If, when it comes to be stirred at home, the judges are in doubt, if the scale of reason hangs tremblingly before their understandings, the weight of a foreign decision will be decisive. Besides, although small minds despise what comes as mere suggestion, men of true discernment know that suggestion is in almost all things, and certainly in law, one of the highest and most beneficial exercises of the human intellect. Now a course of argument, taken as a suggestion, is just as useful coming from a foreign judge, as from any other.

These views of the Scotch law and law books are such as lie upon the mere surface of things; but it is thought they may be of interest to readers in this country, where so little concerning them is known.

J. P. B.